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Before the Federal Communications Commission Washington, D.C. 20554

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In the Matter of)	
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Petition of MCImetro Access Transmission)	
Services LLC Pursuant to Section 252(e)(5))	,
of the Communications Act for Expedited)	WC Docket No. 02-
Preemption of the Jurisdiction of the)	
New York Public Service Commission)	
Regarding Interpretation and)	
Enforcement of Interconnection Agreement)	

PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC

MCI METRO ACCESS TRANSMISSION SERVICES LLC

Lisa R. Youngers Kecia B. Lewis WorldCom, Inc. 1133 19th Street, N.W. Washington, D.C. 20036 (202) 736-6325

Dated: September 6, 2002

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EXECUTIVE SUMMARY

This petition arises from the New York Public Service Commission's ("NY PSC") explicit refusal in an August 7, 2002 letter to "address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic." MCImetro and Verizon executed an Interconnection Agreement on September 2, 1997 ("Agreement"). Pursuant to that Agreement, the parties routinely billed and paid invoices for reciprocal compensation for calls to Internet Service Providers ("ISPs"). In May of 2001, however, Verizon made the unilateral decision to erroneously apply reciprocal compensation rates as set out in the FCC's ISP Remand Order (which was subsequently rejected and remanded by the D.C. Circuit) and withhold monthly payments due to MCImetro over and above those rates. Verizon made this decision without identifying or invoking any change of law provisions and in direct violation of the terms of the interconnection agreement and the orders of the NY PSC.

Although, the <u>ISP Remand Order</u> by its own terms did not alter existing interconnection agreements, Verizon further claimed that the existing MCImetro interconnection agreement should be amended to reflect those rates retroactive to date of the <u>ISP Remand Order</u>. To that end, Verizon filed six petitions with the NY PSC seeking to force six CLECs to agree to an amendment that would retroactively implement the <u>ISP Remand Order</u>'s compensation scheme. In an August 7, 2002 letter the NY PSC staff confirmed that it would not resolve any of the interconnection agreement disputes involving reciprocal compensation. Verizon withdrew its petitions. Consequently, MCImetro chose not to petition the NY PSC in this instance because it is clear the NY PSC will not act.

Specifically, McImetro and Verizon reached an impasse on three questions of contract construction with respect to reciprocal compensation and the FCC's ISP Remand Order. Those three issues are: whether any provision of the interconnection agreement allows Verizon unilaterally to withhold reciprocal compensation payments due pursuant to the Agreement and the NY PSC orders; whether the ISP Remand Order constitutes a change of law under paragraph 8.2 of the Agreement triggering the obligation to amend the Agreement; if any amendment is required, what is the effective date of the amendment under paragraph 20.16 of the Agreement.

Section 252(e) clearly states that where a state commission has failed to act, it may assert jurisdiction. The NY PSC has clearly announced here in its August 7, 2002 letter its outright refusal to address contract interpretations involving reciprocal compensation. As determined in prior FCC cases, a state commission's refusal to interpret and enforce an agreement under section 252 constitutes a failure to act within the meaning of section 252(e)(5). As such, the FCC must preempt the jurisdiction of the NY PSC in this instance where the state commission "has failed to carry out its responsibility" under section 252.

Finally, MCImetro respectfully requests that the Commission expeditiously assume jurisdiction over, interpret and enforce the Agreement. Because Verizon currently withholds payment each month that is rightfully owed to MCImetro for reciprocal compensation, MCImetro is harmed as long as this matter remains unresolved. Further, because the NY PSC has stated publicly that it will not act on the matter at issue in this petition and because section 252(e)(5) grants the FCC clear authority to assume

jurisdiction where the state has failed to act, the Commission need not take three months to decide to preempt the NY PSC's jurisdiction.

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PETITION OF MCIMETRO ACCESS TRANSMISSION SERVICES LLC

MCImetro Access Transmission Services LLC ("MCImetro"), by its attorneys, and pursuant to section 252(e)(5) of the Communications Act, as amended (the "Act"), and section 51.803 of the Federal Communications Commission's (the "FCC" or "Commission") rules, respectfully petitions the FCC to preempt on an expedited basis the jurisdiction of the New York Public Service Commission ("NY PSC") to interpret and enforce the interconnection agreement ("Agreement") between MCImetro and New York Telephone Company, d/b/a Bell Atlantic-New York ("Verizon") with respect to provisions requiring payment of reciprocal compensation for local and Internet-bound traffic and provisions allowing for amendment of the Agreement upon a change in law. This petition arises from the NY PSC's explicit refusal to "address any future petitions"

¹ 47 U.S.C. § 252(e)(5).

² 47 C.F.R. § 51.803.

addressing contract interpretations of reciprocal compensation for Internet-bound traffic."³

MCImetro is a wholly owned subsidiary of WorldCom, Inc. MCImetro and Verizon executed the Agreement on September 2, 1997, and the NY PSC entered an order approving the Agreement on October 1, 1997. Under the Agreement, the parties routinely billed and paid invoices for reciprocal compensation for local calls and calls to Internet Service Providers ("ISPs").

Verizon has materially breached the Agreement by refusing to pay MCImetro reciprocal compensation amounts that MCImetro has billed under the terms of the Agreement. The NY PSC has stated its refusal to resolve precisely the type of dispute that is the subject of this Petition. Therefore, MCImetro requests that the Commission expeditiously assume jurisdiction over, interpret and enforce the Agreement.

I. Background

In 1999, the NY PSC undertook a re-examination of reciprocal compensation, focusing on traffic bound for ISPs and competitive local exchange carriers ("CLECs") whose customers were predominantly ISPs. Following an evidentiary hearing and briefing by the parties, the NY PSC determined in its <u>Opinion No. 99-10</u> that ISP-bound

³ Letter from Janet Hand Deixler, Secretary, New York Pub. Serv. Comm'n to Gayton P. Gomez, Esq., Verizon (Aug. 7, 2002) at 2 ("NY PSC Letter") (attached hereto as Exhibit 1).

⁴ NY PSC Case 96-C-0787, Petition of MCI Telecom Corp., Pursuant to § 252(b) of the Telecom Act of 1996, for Arbitration to Establish an Intercarrier Agreement Between MCImetro and New York Tel. Co., Order Approving Interconnection Agreement, Rejecting Portions Thereof, and Granting Reconsideration (Oct. 1, 1997). The order is available at www.dps.state.ny.us/fileroom/doc3130.pdf.

traffic remained subject to the payment of reciprocal compensation under interconnection agreements. In doing so, the NY PSC established a rebuttable presumption regime. Without upsetting existing interconnection agreements, the Commission ruled that CLECs whose ratios of terminating-to-originating traffic exceeded 3:1 would be paid reciprocal compensation at a lower, "end office" rate, while CLECs whose ratios did not exceed 3:1 would continue to be paid reciprocal compensation at the higher "tandem" rates ⁶

Subsequent to Opinion No. 99-10, Verizon began paying the lower "end office" rate to two other WorldCom subsidiaries whose ratios of terminating-to-originating traffic exceeded 3:1. However, McImetro continued to bill and Verizon continued to pay reciprocal compensation rates at the higher tandem rates because McImetro's terminating-to-originating traffic ratio does not exceed the 3:1 threshold. Verizon conceded as much during the course of a dispute over payment to the other two WorldCom subsidiaries, and the NY PSC agreed.⁷

⁵ NY PSC Case 99-C-0529, <u>Proceeding on Mot'n of the Comm'n to Reexamine Reciprocal Compensation</u>, Opin. No. 99-10, Opinion and Order Concerning Reciprocal Compensation (Aug. 26, 1999) at 58-59 ("<u>Opinion No. 99-10</u>") (attached hereto as Exhibit 2).

⁶ Opinion No. 99-10 at 56-57.

⁷ NY PSC Case 99-C-0529, Letter from Joseph A. Post, Esq. Verizon to Janet Hand Deixler, Secretary, NY PSC (Mar 20, 2001) at n. 1: "'the reciprocal compensation arrangements in the MCIMETRO agreement ... are not subject to the Opinion 99-10 presumption" (attached hereto as Exhibit 3), quoting NY PSC Case 99-C-0529, Order Rejecting Rebuttal Presentation (Feb, 1, 2001) at 6.

On April 27, 2001, the FCC issued its ISP Remand Order. ⁸ The ISP Remand
Order has since been rejected and remanded by the D.C. Circuit, which found that the
fundamental legal basis of the ISP Remand Order was "precluded." The ISP Remand
Order sets forth rate and growth caps that are applicable prospectively for the exchange
of ISP-bound traffic under certain circumstances. The Commission established a
presumption that only "traffic delivered to a carrier, pursuant to a particular contract, that
exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic that is subject
to the compensation mechanism set forth in this Order." The ISP Remand Order by its
own terms did not alter existing interconnection agreements. As the Commission stated:
"The interim compensation regime we establish here applies as carriers re-negotiate
expired or expiring interconnection agreements. It does not alter existing contractual
obligations, except to the extent that any parties are entitled to invoke contractual change
of law provisions."

Nonetheless, without identifying, much less invoking, any change of law provisions, Verizon notified MCImetro shortly after the <u>ISP Remand Order</u> was issued that it was unilaterally implementing the rate and growth caps in the <u>ISP Remand Order</u> and would refuse to pay invoiced reciprocal compensation amounts that exceeded the rates available under the FCC's new prospective compensation regime in the <u>ISP Remand</u>

⁸ Order on Remand & Report & Order, <u>In re Implementation of the Local Competition Provisions in the Telecom Act of 1996, Intercarrier Comp. for ISP-Bound Traffic, FCC 01-131, CC Docket Nos. 96-98, 99-68 (rel. Apr. 27, 2001) (<u>ISP Remand Order</u>).</u>

⁹ WorldCom, Inc. v. FCC, 288 F.3d 429 (D.C. Cir. 2002)

¹⁰ ISP Remand Order ¶ 79.

¹¹ <u>Id.</u> ¶ 82.

Order. 12 Verizon then began unilaterally applying the rates set out in the ISP Remand Order and withholding all reciprocal compensation amounts due to MCImetro over and above those rates. 13 Verizon took this action in violation of the Agreement and NY PSC Opinion No. 99-10 and in blatant disregard of the fact that MCImetro's terminating-to-originating traffic ratio does not exceed 3:114 and its own concession (and the NY PSC's finding) to this effect. WorldCom disputed Verizon's action 15 but nonetheless offered to enter into good faith negotiations to resolve the dispute if Verizon could identify an applicable change of law provision, which Verizon later identified. 16 This provision, however, is inapplicable. The ISP Remand Order did not "make unlawful any provision

In the event the FCC or the Commission promulgates rules or regulations, or issues orders, or a court of competent jurisdiction issues orders which make unlawful any provision of this Agreement, or which materially reduce or alter the services required by statute or regulations and embodied in this Agreement, then the Parties shall negotiate promptly and in good faith in order to amend the Agreement to substitute contract provisions which conform to such rules[.]

Section 8.2 of the MCImetro/Verizon – New York Interconnection Agreement (attached hereto as Exhibit 8).

¹² Letter dated May 14, 2001 from Jeffrey A. Masoner, Verizon to MCI WorldCom Communications Inc. (attached hereto as Exhibit 4)

¹³ <u>See</u> Letter dated August 21, 2001 from Lori Carbone, Verizon Wholesale Services, to MCl WorldCom Communications, Inc. (attached hereto as Exhibit 5).

¹⁴ Letter dated July 31, 2001 from Jack H. White, Jr., Verizon to John A. Trofimuk, MCI WorldCom ("July 31, 2001 Verizon Letter") (attached hereto as Exhibit 6).

¹⁵ Letter dated June 12, 2001 from John A. Trofimuk, WorldCom to Jeffrey A. Masoner, Verizon (attached hereto as Exhibit 7).

¹⁶ In the July 31, 2001 Verizon Letter, Verizon identified the following change of law provision:

of this Agreement." Nor did it "materially reduce or alter the services required by statute or regulations."

During negotiations, Verizon consistently insisted that any amendment should be retroactive to the effective date of the Commission's <u>ISP Remand Order</u>. This too, however, was contrary to the express terms of the Agreement. MCImetro also pointed out that no provision in the Agreement allowed Verizon unilaterally to withhold payments during the pendency of this dispute. While negotiations continued, they were ultimately unsuccessful. 18

After the <u>ISP Remand Order</u> had been issued but before it had been remanded, Verizon filed six similar petitions with the NY PSC seeking to compel six different CLECs to agree to Verizon's contractual amendment that would retroactively implement the <u>ISP Remand Order</u>'s compensation scheme. Although two of those CLECs were WorldCom subsidiaries, MCImetro was not among the six. Ostensibly, this was because MCImetro's terminating-to-originating traffic ratio does not exceed 3:1 and the execution of a contract amendment to implement the ISP compensation regime in the FCC's <u>ISP</u>

¹⁷ The agreement specifically provides that, "[n]o provision of this Agreement shall be deemed amended or modified by either Party unless such amendment or modification is in writing, dated and signed by both parties." Interconnection Agreement, ¶ 20.16. Thus, no amendment is effective until executed.

¹⁸ MCImetro and Verizon reached impasse on three questions of contract construction:

⁽¹⁾ Whether any provision of the interconnection agreement allows Verizon unilaterally to withhold reciprocal compensation payments due under the Agreement and the NY PSC orders during the pendency of this dispute;

⁽²⁾ Whether the <u>ISP Remand Order</u> constitutes a change of law under paragraph 8.2 of the Agreement triggering the obligation to amend the Agreement;

Order on Remand, which utilizes a similar 3:1 ratio, would not have impacted the intercarrier compensation rates.

On April 11, 2002, MCImetro sent a demand letter ("MCImetro Demand Letter) to Verizon requesting payment for properly invoiced reciprocal compensation amounts that Verizon has failed to remit pursuant to the Agreement and indicating that a failure to remit payment for the invoiced reciprocal compensation would cause MCImetro to initiate an action with the NY PSC to enforce the Agreement. 19 Verizon responded to the MCImetro Demand Letter on May 9, 2002, refusing to remit the invoiced amounts and claiming that it was entitled to rebut the presumption, under the ISP compensation scheme announced in the FCC's ISP Remand Order, that the MCImetro traffic that did not exceed the 3:1 ratio was nonetheless ISP-bound traffic. 20 Verizon continues to withhold payment for properly invoiced reciprocal compensation amounts, even though (i) the Agreement has not been amended to implement the ISP compensation regime in the FCC's ISP Remand Order; (ii) the ISP Remand Order did not trigger the change of law provision in the Agreement, and (iii) under the ISP compensation regime in the ISP Remand Order, Verizon must rebut the presumption before traffic under the 3:1 ratio is to be considered ISP-bound traffic and must not withhold payments in the interim.

Through discussions with the NY PSC Staff, it became clear to Verizon and to WorldCom (participating on behalf of its other two subsidiaries) that the NY PSC would

⁽³⁾ If any amendment is required, what is the effective date of the amendment under paragraph 20.16 of the Agreement.

Letter dated April 11, 2002 from Curtis L. Groves, WorldCom, to Sandra DiIorio Thorn, Verizon (attached hereto as Ex. 9).

not resolve any of the contractual disputes regarding the effect of the <u>ISP Remand Order</u>. The New York Department of Public Service, which functions as the NY PSC's Staff, memorialized this understanding in the NY PSC Letter dated August 7, 2002, in which it unambiguously declared that "because adequate, alternative forums exist, the [NY PSC] will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."²¹

Because NY PSC Staff had already expressed to MCImetro that it would not address any further petitions regarding the interpretation of interconnection agreements with respect to Internet-bound traffic, MCImetro has not petitioned the NY PSC for relief to resolve this dispute. To do so would be a waste of resources, as the NY PSC has clearly indicated by the August 7, 2002 NY PSC Letter that it "will not address petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."

II. The New York Public Service Commission has Failed to Act.

The Commission's authority to assert jurisdiction under section 252(e)(5) of the Act is premised on a finding that a state commission has "failed to act" in "any proceeding or other matter under [section 252]." In the instant dispute, the NY PSC has announced its outright refusal to address contract interpretation questions described above, thereby failing to act under section 252(e)(5).

²⁰ Letter dated May 9, 2002 from Gayton P. Gomez, Verizon, to Curtis Groves, WorldCom (attached hereto as Ex. 10).

²¹ NY PSC Letter at 2.

²² NY PSC Letter at 2.

This Commission has already determined in <u>Starpower</u> that "a dispute arising from interconnection agreements and seeking interpretation and enforcement of those agreements is within the states' 'responsibility' under section 252". Relying on federal court precedent, the Commission concluded that "inherent in state commissions' express authority to mediate, arbitrate, and approve interconnection agreements is the authority to interpret and enforce previously approved agreements". Consistent with this Commission's <u>Starpower</u> conclusions, a state commission's refusal to interpret and enforce an agreement under section 252 constitutes a failure to act within the meaning section 252(e)(5).

Rather than interpret and enforce the Agreement in accordance with the mandates of the Act, the NY PSC has refused to act on six petitions already before it and has stated that it will not address any future disputes that involve contract interpretations of interconnection agreements regarding Internet-bound traffic. ²⁵ Specifically, the NY PSC stated that "because adequate, alternative forums exist, the Department [NY PSC] will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic". ²¹ This is a clear case of a state commission's

^{23 &}lt;u>Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, (rel. June 14, 2000) at 2 (Starpower).</u>

²⁴ Starpower at 2.

²⁵ See NY PSC Letter at 2.

Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-52, FCC 00-216 (rel. June 14, 2000).

failure or refusal to act to interpret and enforce interconnection agreements under section 252(e)(5).

III. The FCC Should Preempt the NY PSC.

Because of the NY PSC's outright refusal to interpret and enforce the parties'

Agreement, grant of this Petition would be consistent with the requirements of sections 251 and 252(e)(5). As in Starpower²⁷ and Cox,²⁸ the state commission here has expressly declined to resolve the petition for interpretation and enforcement of an interconnection agreement.

The Act is clear. Section 252(e)(5) requires the Commission to preempt the jurisdiction of a state commission in any proceeding or matter in which the state commission "fails to act to carry out its responsibility" under section 252. Specifically, Section 252(e)(5) provides that:

If a State commission fails to act to carry out its responsibility under this section in any proceeding or other matter under this section, then the Commission shall issue an order preempting the State commission's jurisdiction of that proceeding or matter within 90 days after being notified (or taking notice) of such failure, and shall assume the responsibility of the State commission under this section with respect to the proceeding or matter and act for the State Commission.²⁹

²⁸ Cox Virginia Telecom, Inc., Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996, CC Docket No. 00-126, DA 00-2118 (rel. Sept. 18, 2002).

²⁹ 47 U.S.C. § 252(e)(5) (emphasis added).

Indeed, the Commission has expressly acknowledged its authority to preempt a state's jurisdiction in these instances.³⁰

The language of section 252(e)(6) of the Act further supports grant of this Petition. There, Congress unequivocally stated that "[i]n a case where a State fails to act as described in [section 252(e)(5)], the proceeding by the Commission under such paragraph and any judicial review of the Commission's actions shall be *the exclusive* remedies for a State commission's failure to act." 47 U.S.C. § 252(e)(6) (emphasis added). Congress thus directed the Commission to serve as an alternative forum for mediation, arbitration and enforcement proceedings where a state fails to carry out its responsibilities under section 252 of the Act.

IV. Expedited Treatment is Necessary.

MCImetro requests expedited treatment of its Petition. In this instance, the Commission's consideration of the merits does not require 90 days for a decision to preempt the NY PSC's jurisdiction. The facts here are simple. MCImetro and Verizon have a dispute concerning the treatment of Internet-bound traffic under their Agreement. Attempts to reach a negotiated outcome of the dispute have failed. This Commission has found that interpretation and enforcement of interconnection agreements is within the

³⁰ 26 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 11628, ¶ 1285 (1996) (subsequent history omitted) (Local Competition Order). Furthermore, in the context of other preemption petitions, the Commission has also acknowledged its authority to enforce an agreement where the state commission fails to act. In Starpower, the Commission found that the state commission failed to act when it declined to interpret and enforce the interconnection agreement before it. As a result, the Commission assumed jurisdiction over enforcement of the agreement. Starpower, ¶ 7. The Commission took similar action in Cox. Cox at ¶ 4.

responsibility granted to the states under Section 252 of the Act. The NY PSC, however,

has publicly stated its refusal to act on "any future petitions addressing contract

interpretations of reciprocal compensation for Internet-bound traffic" – precisely the

nature of the instant dispute. As such, the Commission need not take three months to

decide to preempt the NY PSC's jurisdiction and to initiate a proceeding to provide such

an interpretation. Because Verizon is withholding payment each month that is rightfully

owed to MCImetro for reciprocal compensation, MCImetro is harmed as long as this

matter remains unresolved. The revenue already denied by Verizon's refusal to pay and

the NY PSC's subsequent decision not to take action continues to harm MCImetro.

V. Conclusion

For the foregoing reasons, MClmetro respectfully requests that the Commission

grant the instant petition to preempt the NY PSC's jurisdiction and immediately institute

a proceeding to interpret and enforce the interconnection agreement as set forth herein.

Respectfully submitted,

MCI METRO ACCESS

TRANSMISSION SERVICES LLC

your Kings or

Lisa R. Youngers

Kecia B. Lewis

WorldCom, Inc.

1133 19th Street, N.W.

Washington, D.C. 20036

(202) 736-6325

Dated: September 6, 2002

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AFFIDAVIT OF CURTIS L. GROVES AND MICHAEL J. HENRY

- 1. My name is Curtis L. Groves. I am Senior Attorney, Law and Public Policy for WorldCom, Inc. ("WorldCom"), the parent company of MCImetro Access Transmission Services, Inc. ("MCImetro"). My duties include representing WorldCom and its subsidiaries in all regulatory matters before the New York Public Service Commission ("NY PSC"). I have been employed by WorldCom and previously MCI Telecommunications Corp. since 1996, and have represented WorldCom in New York regulatory matters since 1997.
- 2. My name is Michael J. Henry. I am an Associate Counsel, Law and Public Policy for WorldCom, Inc. ("WorldCom"), the parent company of MCImetro. My duties include management and coordination of negotiations and litigation to collect inter-carrier compensation owed to WorldCom by its customers, including Verizon. I have been employed by WorldCom and previously MCI Telecommunications Corp. since 1988.
- The purpose of this Affidavit is to explain that Verizon has materially breached the interconnection agreement between MCImetro and Verizon by refusing to pay MCImetro reciprocal compensation amounts that MCImetro has billed under the terms of that agreement, and that the NY PSC has stated its refusal to resolve precisely this type of dispute involving contract interpretations of reciprocal compensation for Internet-bound traffic.
- 4. MCImetro and Verizon executed an interconnection agreement ("Agreement") with Verizon on September 2, 1997, which was later approved by the NY PSC. Under the Agreement, the parties routinely billed and paid invoices for reciprocal compensation for local calls and calls to Internet Service Providers ("ISPs").

- In Opinion No. 99-10, the NY PSC determined that ISP-bound traffic remained subject to the payment of reciprocal compensation under interconnection agreements. The NY PSC established a rebuttable presumption regime and ruled, subject to existing interconnection agreements, that, CLECs whose ratios of terminating-to-originating traffic exceeded 3:1 would be paid reciprocal compensation at a lower, "end office" rate, while CLECs whose ratios did not exceed 3:1 would continue to be paid reciprocal compensation at the higher "tandem" rates.
- 6. After the release of the NY PSC's Opinion No. 99-10, Verizon began paying the lower "end office" rate to two other WorldCom subsidiaries whose ratios of terminating-to-originating traffic exceeded 3:1. MCImetro, however, continued to bill and Verizon continued to pay reciprocal compensation rates at the higher tandem rates because MCImetro's terminating-to-originating traffic ratio does not exceed the 3:1 threshold.
- 7. In a March 20, 2001 letter from Joseph A. Post, Verizon, to Janet Hand Deixler, Secretary, NY PSC, Verizon conceded that the reciprocal compensation arrangements in the MCImetro agreement are not subject to the presumption in Opinion No. 99-10. The NY PSC noted the same in its Feb. 1, 2001 Order in Case 99-C-0529.
- 8. On April 27, 2001, the FCC issued its <u>ISP Remand Order</u>, which sets forth rate and growth caps that are applicable prospectively for the exchange of ISP-bound traffic under certain circumstances. The <u>ISP Remand Order</u> by its own terms did not alter, however, existing interconnection agreements.
- In a May 14, 2001 Letter, Verizon notified MCImetro that it was unilaterally implementing the rate and growth caps in the <u>ISP Remand Order</u> and would refuse to pay invoiced reciprocal compensation amounts that exceeded the rates available under the FCC's new prospective compensation regime in the <u>ISP Remand Order</u>. Verizon did not rely on any change of law provisions in the Agreement.
- 10. Verizon also began unilaterally applying the rates set out in the <u>ISP Remand</u>
 Order and withholding all reciprocal compensation amounts due to MCImetro
 over and above those rates.
- Although MCImetro disputed Verizon's action, it entered into good faith negotiations to resolve the dispute if Verizon could identify an applicable change of law provision, which Verizon finally identified in a July 31, 2001 letter to WorldCom. Negotiations were ultimately unsuccessful.
- 12. The change of law provision that Verizon identified, however, is inapplicable. Furthermore, Verizon's insistence throughout negotiations that any amendment be

- retroactive to the effective date of the <u>ISP Remand Order</u> was contrary to the express terms of the Agreement.
- 13. Immediately after the <u>ISP Remand Order</u> was issued, Verizon filed six petitions with the NY PSC seeking to compel six different CLECs to agree to Verizon's contractual amendment that would retroactively implement the <u>ISP Remand Order</u>'s compensation scheme. MCImetro was not among the six. Presumably, this was because MCImetro's terminating-to-originating traffic ratio does not exceed 3:1 and the execution of a contract amendment to implement the ISP compensation regime in the FCC's <u>ISP Order on Remand</u>, which utilizes a similar 3:1 ratio, would not have impacted the inter-carrier compensation rates.
- On April 11, 2002, MCImetro sent a demand letter to Verizon requesting payment for properly invoiced reciprocal compensation amounts that Verizon failed to remit pursuant to the Agreement. MCImetro also indicated that a failure to remit payment for the invoiced reciprocal compensation would cause MCImetro to initiate an action with the NY PSC to enforce the Agreement.
- 15. In its response, Verizon claimed that it was entitled to rebut the <u>ISP Remand</u> Order's presumption and that the MCImetro traffic that did not exceed the 3:1 ratio was nonetheless ISP-bound traffic subject to the compensation scheme set forth in the <u>ISP Remand Order</u>. Verizon continued to withhold payment.
- 16. To date, Verizon continues to withhold payment for properly invoiced reciprocal compensation amounts. This despite the facts that the Agreement was never amended, the <u>ISP Remand Order</u> did not trigger the change of law provision in the Agreement, Verizon had not rebutted the presumption *before* traffic under the 3:1 ratio is to be considered ISP-bound traffic, and the <u>ISP Remand Order</u>, itself, has been remanded by the D.C. Circuit, which found the legal underpinnings of the ISP Remand Order were "precluded."
- 17. The NY PSC Staff made it clear that it would not resolve any of the contractual disputes regarding the effect of the <u>ISP Remand Order</u>. The New York Department of Public Service, which functions as the NY PSC's Staff, memorialized this in the NY PSC Letter dated August 7, 2002 where it clearly stated that "because adequate, alternative forums exist, the [NY PSC] will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic."
- 18. An unnecessary lengthy consideration of MCImetro's preemption petition in this case will only serve to further the harm while this matter remains unresolved.

I, Curtis L. Groves hereby attest and state that the statements contained herein are true and correct to the best of my knowledge, information, and belief.

Subscribed and sworn to before me this 4th day of September, 2002.

My Commission expires:

Capricia Galloway Notary Public, District of Columbia

My Commission Expires 07-15-2006

(Appropriate date)

I, Michael J. Henry hereby attest and state that the statements contain	ned herein are true
and correct to the best of my knowledge, information, and belief.	and the true

Michael J. Henry

Subscribed and sworn to before me this $\frac{1}{2}$ day of September, 2002.

(Signature of notary)

My Commission expires:

(Appropriate date)

OFFICIAL SEAL
Melissa A. Burris
Notary Public, State of Georgia
Dekalb County
The maken Expires Man 15 201

Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this sixth day of September, 2002, I have caused to be served by hand delivery a true and correct copy of MCImetro Access Transmission Services' Petition in the matter of WC Docket No. 02- on the following:

Marlene H. Dortch *
Secretary
Federal Communications Commission
445 Twelfth Street, NW
Washington, DC 20554

Michelle Carey *
Chief
Competition Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 Twelfth Street, NW
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Lonzena Rogers

^{*} Denotes Hand Delivery

⁺ Denotes FedEx

EXHIBIT 1

STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

THREE EMPIRE STATE PLAZA, ALBANY, NY 12223-1350

Internet Address: http://www.dps.state.nv.us

PUBLIC SERVICE COMMISSION

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AUG 1 2 2002

August 7, 2002

Gayton P. Gomez, Esq. Verizon New York, Inc. 1095 Avenue of the Americas Room 3735 New York, New York 10036

> Re: Petitions For Relief Under the Expedited Dispute Resolution Process in Cases 02-C-0279, 02-C-0293, 02-C-0294, 02-C-0295, 02-C-0550, and 02-C-0675.

Dear Ms. Gomez:

In a letter dated July 10, 2002, you recited Verizon's understanding that the Commission will not address the six expedited dispute resolution petitions above and, therefore, Verizon was withdrawing them. You also stated Verizon's assumption that the Commission will not address any future petitions addressing contract interpretations of reciprocal compensation for Internet-bound traffic, and requested that the Commission advise Verizon as to the correctness of that assumption.

This letter acknowledges Verizon's withdrawal of the above-referenced cases.

The cases will be closed. This letter also confirms that because adequate, alternative forums

exist, the Department will not address any future petitions addressing contract interpretations of reciprocal commensation for Internet-bound traffic.

Very truly yours,

Sanet Hand Deixler Secretary

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cc: Sandra Thorne, Esq. (Verizon) Saul M. Abrams, Esq-(Staff) Karen Nations, Esq. Renardo L. Hicks, Esq. Andrew D. Fisher, Esq. Michael L. Shor, Esq. Michael W. Fleming, Esq. Joseph O. Kahl, Esq. Russell Blau, Esq. Ms. Terry J. Romine Keith J. Roland, Esq. Mr. Gerry Nicholson Michael J. Henry, Esq. Curtis L. Groves, Esq. Darryl M. Bradford, Esq. John J. Hamill, Esq. Daniel J. Weiss, Esq.